NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
	:	
CLARENCE M. GREEN, JR.,	:	
	:	
Appellant	:	No. 1443 WDA 2013

Appeal from the Order August 13, 2013
In the Court of Common Pleas of Allegheny County
Criminal Division No(s).: CP-02-CR-0010711-2006

BEFORE: GANTMAN, P.J., DONOHUE, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED APRIL 15, 2014**

Appellant, Clarence M. Green, Jr., appeals from the order entered in the Allegheny County Court of Common Pleas dismissing his first Post Conviction Relief Act[1] ("PCRA") petition. Appellant suggests his trial counsel was ineffective for failing to invoke the defense of duress and request a jury instruction on duress. We affirm.

We adopt the facts and procedural history set forth in our prior memorandum affirming his judgment of sentence on direct appeal. ***See Commonwealth v. Green***, 599 WDA 2008 (Pa. Super. Sept. 29, 2010).

* Former Justice specially assigned to the Superior Court.

[1] 42 Pa.C.S. §§ 9541-9546.

Our Supreme Court denied Appellant's petition for allowance of appeal on March 30, 2011. The PCRA court docketed Appellant's *pro se* PCRA petition on December 22, 2011. The court appointed counsel for Appellant. On July 5, 2012, appointed counsel filed a motion to withdraw pursuant to ***Turner***/***Finley***.[2] Counsel's motion explained why the defense of duress was meritless:

> The Supreme Court has examined the [duress] statute and has found that the defendant must show the following: (1) there was a use of, or threat to use, unlawful force against the defendant or another person; and (2) the use of, or threat to use, unlawful force was of such a nature that a person of reasonable firmness in the defendant's situation would have been unable to resist it. ***Commonwealth v. DeMarco***, 570 Pa. 263, 272, 809 A.2d 256, 261-262 (2002). In this case, there was never **the use of, or a threat to use, unlawful force** against [Appellant] or another person. The claim has no merit. Counsel was not required to raise a baseless claim. Moreover, if one wants to accept [Appellant's] argument, [Appellant] recklessly placed himself in that situation by committing criminal acts which resulted in a warrant for his arrest. 18 Pa.C.S. § 309(b).

Ex. 1 to Mot. for Leave to Withdraw, 7/5/12. On July 19, 2012, the PCRA court granted counsel's motion to withdraw.

The PCRA court, also on July 19, 2012, issued a Pa.R.Crim.P. 907 notice of intent to dismiss. Appellant did not file a response. On September

[2] ***See Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988); ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*).

4, 2012, the court dismissed Appellant's PCRA petition.[3] On February 7, 2013, the PCRA court docketed Appellant's notice of appeal, which was dated September 16, 2012.[4]

The PCRA court appointed counsel for Appellant. The subsequent procedural history is convoluted. In sum, (1) Appellant's appeal was discontinued, (2) on August 12, 2013, the PCRA granted Appellant permission to file an appeal *nunc pro tunc* from the September 4, 2012 order, and (3) Appellant filed a *nunc pro tunc* appeal on August 30, 2013. The PCRA court did not order Appellant to comply with Pa.R.A.P. 1925(b).

Appellant raises the following issue:

> Did the [PCRA] court err in dismissing the PCRA petition without a hearing and allowing counsel leave to withdraw, insofar as trial counsel was ineffective for failing to invoke the defense of duress and requesting a jury instruction on duress, where evidence was presented that [Appellant] engaged in conduct constituting a criminal offense because he was coerced to do so as a result of threat of bodily harm of such a nature that a person of reasonable firmness in his situation would have been unable to resist?

Appellant's Brief at 4.

For his sole issue, Appellant argues that he believed his life was at risk and was aware of a warrant for his arrest when he requested medical

[3] The order was dated August 29, 2012, and docketed on September 4, 2012.

[4] The PCRA court was aware of Appellant's appeal before it was docketed, as the PCRA court ordered that the record be transmitted to this Court on January 18, 2013. Order, 1/18/13.

treatment. He suggests that he was in imminent harm and had no means to abate that harm other than by giving a false identity. Appellant consequently states that his trial counsel was ineffective by not raising a defense of duress. We hold Appellant is not entitled to relief.

> This court's standard of reviewing an order dismissing a PCRA petition is whether the determination of the PCRA court is supported by the record evidence and is free of legal error. The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. Moreover, a PCRA court may decline to hold a hearing on the petition if the PCRA court determines that the petitioner's claim is patently frivolous and is without a trace of support in either the record or from other evidence.

Commonwealth v. Hart, 911 A.2d 939, 941 (Pa. Super. 2006) (citations omitted).

> [C]ounsel is presumed to have provided effective representation unless the PCRA petitioner pleads and proves that: (1) the underlying claim is of arguable merit; (2) counsel had no reasonable basis for his or her conduct; and (3) Appellant was prejudiced by counsel's action or omission. To demonstrate prejudice, an appellant must prove that a reasonable probability of acquittal existed but for the action or omission of trial counsel. A claim of ineffective assistance of counsel will fail if the petitioner does not meet any of the three prongs. Further, a PCRA petitioner must exhibit a concerted effort to develop his ineffectiveness claim and may not rely on boilerplate allegations of ineffectiveness.

Commonwealth v. Perry, 959 A.2d 932, 936 (Pa. Super. 2008) (punctuation marks and citations omitted).

Our Supreme Court has discussed the defense of duress as follows:

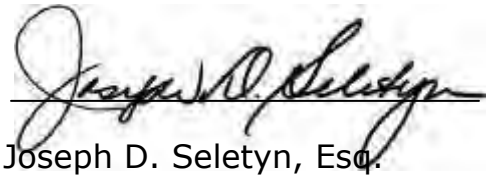
> As set forth by the General Assembly in Section 309, in order to establish the duress defense in this Commonwealth, there must be evidence that: (1) there was a use of, or threat to use, unlawful force against the defendant or another person; and (2) the use of, or threat to use, unlawful force was of such a nature that a person of reasonable firmness in the defendant's situation would have been unable to resist it. Thus, to establish the duress defense under Section 309, unlike under the common law rule, the force or threatened force does not need to be of present and impending death or serious bodily injury. Instead, the relevant inquiry under Section 309 is whether the force or threatened force was a type of unlawful force that "a person of reasonable firmness **in [the defendant's] situation** would have been unable to resist." ***Id.*** (emphasis added). This test is a hybrid objective-subjective one. ***See*** 18 Pa.C.S. 309 cmt. (1972) ("[section 309] is derived from section 2.09 o[f] the model penal code"); MODEL PENAL CODE § 2.09 explanatory note (1985); ***id.*** § 2.09 cmt. at 7 (Tent. Draft No. 10, 1960). While the trier of fact must consider whether an objective person of reasonable firmness would have been able to resist the threat, it must ultimately base its decision on whether that person would have been able to resist the threat if he was subjectively placed in the defendant's situation. Therefore, in making its determination, the trier of fact must consider "stark, tangible factors, which differentiate the [defendant] from another, like his size or strength or age or health." MODEL PENAL CODE § 2.09 cmt. at 7 (Tent. Draft No. 10, 1960). Although the trier of fact is not to consider the defendant's particular characteristics of temperament, intelligence, courageousness, or moral fortitude, the fact that a defendant suffers from "a gross and verifiable" mental disability "that may establish irresponsibility" is a relevant consideration. ***Id.*** at 6. Moreover, the trier of fact should consider any salient situational factors surrounding the defendant at the time of the alleged duress, such as the severity of the offense the defendant was asked to commit, the nature of the force used or threatened to be used, and the alternative ways in which the defendant may have averted the force or threatened force. ***See id.*** at 7-8.

Commonwealth v. DeMarco, 809 A.2d 256, 261-62 (Pa. 2002). "[W]hen a defense of duress is proposed, the defendant should . . . present evidence of violent acts, known to the defendant, committed by the alleged intimidating figure." ***Commonwealth v. Russell***, 473 A.2d 1383, 1385 (Pa. Super. 1984) (awarding new trial because court should have permitted defendant to introduce such evidence). Moreover, "poor [prison] medical care do[es] not constitute 'force against [a defendant's] person". ***Commonwealth v. Stanley***, 446 A.2d 583, 589 (Pa. 1982) (holding defendant could not invoke prison "overcrowding and poor medical care" as constituting unlawful force for purposes of invoking duress defense).

Instantly, Appellant has not identified any actor or intimidating figure who coerced or otherwise engaged in unlawful force to compel him to commit forgery, identity theft, and to fraudulently procure public assistance. ***See DeMarco***, 809 A.2d at 261-62; ***Russell***, 473 A.2d at 1385. Furthermore, speculative allegations that Appellant would have been refused medical treatment had he provided his true identity do not constitute unlawful "force" for purposes of raising the defense of duress. ***Cf. Stanley***, 446 A.2d at 589. Because the underlying claim lacks arguable merit, Appellant cannot establish his counsel was ineffective. ***See Perry***, 959 A.2d at 936. Accordingly, having discerned no error of law, ***see Hart***, 911 A.2d at 941, we affirm the order below.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/15/2014